

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7270

Joint Petition of Verizon New England Inc.,d/b/a)
Verizon Vermont, certain affiliates thereof, and)
FairPoint Communications, Inc. for approval of an asset)
transfer, acquisition of control by merger and associated)
transactions)

Order entered: 12/29/2011

ORDER APPROVING EXTENSION OF DEADLINE

I. INTRODUCTION

On December 16, 2011, Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications ("FairPoint"), filed a motion (the "Motion") with the Vermont Public Service Board (the "Board") requesting a three-month extension of the deadline from December 31, 2011, to March 31, 2012, to utilize Performance Enhancement Plan ("PEP") funds, as described in the Order of the Board dated February 15, 2008, in this docket. In this Order, the Board approves the requested extension.

II. BACKGROUND

On February 15, 2008, the Board issued an Order approving, with conditions, the proposed merger transaction under which the landline telephone assets and business formerly operated by Verizon New England Inc., et al ("Verizon") were transferred to FairPoint. As part of the proposed transaction, the Board's Order required FairPoint to implement, at the time of the transaction closing, the Performance Enhancement Plan. The PEP was "designed to prompt more investment and improve service quality in the first three years of FairPoint's operation by requiring FairPoint to set aside funds when it fails to meet specified standards."¹ Under this requirement, FairPoint was to set aside certain funds if it failed to meet specified performance

1. Docket No. 7270, Order of 2/15/08 at 4.

targets. These performance targets focus on service quality issues and are substantially similar to the existing standards set out in FairPoint's Service Quality Plan ("SQP"). In each year of the PEP (2008–2010), FairPoint was to set aside up to \$12.5 million, depending upon the extent to which it failed to meet the specified standard.² In the event FairPoint did not utilize all the set aside funds, the unused amount would be carried forward (less any forfeited amount) to be utilized in future years. If at the end of 2010 FairPoint had not utilized all such set-aside funds, then FairPoint was to use those funds to remedy any remaining service quality issues by the end of 2011. To the extent there were funds left over at the end of 2011, and FairPoint had not satisfied all of the Service Quality metrics applicable in 2011, and had not remediated all existing service quality problems, then certain amounts of the funds (up to \$1 million) would be forfeited and distributed to the Vermont Telecommunications Authority ("VTA").³ By the end of 2010, not all of the set aside funds in the PEP had been utilized by FairPoint, thus the expiration date for the PEP was automatically extended to December 31, 2011.

In its Motion, FairPoint estimates that there will be approximately \$2.8 million remaining in the PEP at year-end 2011. Due to significant delays experienced by FairPoint as a result of storm damage to FairPoint's network caused by Tropical Storm Irene, and given that restoration efforts are ongoing, FairPoint asserts that it will be impossible for it to expend the remaining funds in the PEP by year-end. Consequently, FairPoint requests that the Board extend the deadline of the PEP from December 31, 2011, to March 31, 2012, so as to provide FairPoint with additional time to meet its obligations under the PEP and to avoid the associated financial penalties and forfeiture.

III. FINDINGS

1. Beginning on August 28, 2011, flooding due to Tropical Storm Irene turned streams and rivers into raging waterways carrying away bridges and large segments of highways causing unprecedented damage to Vermont's infrastructure. At least a dozen communities were isolated

2. Given the state of Verizon's network at that time, and FairPoint's expectation that it would need to set aside the maximum amount in the first two years (2008 and 2009) of the PEP, we directed Verizon to deposit, prior to closing, \$25 million with a neutral administrator to be used for any set-asides in the first two years of the PEP and any remediation FairPoint implements. Docket No. 7270, Order of 2/15/08 at 24-25, 44.

3. Docket No. 7270, Order of 2/15/08 at 22-23.

and approximately 900 homes were destroyed. The Vermont Agency of Transportation ("VTrans") estimated the costs to repair the Vermont infrastructure to be between \$175 million and \$250 million, which exceeded the amount that VTrans would normally spend in an entire highway construction season. During the months of September and October, VTrans repaired over 500 miles of damaged roads and 200 state-owned bridges. Additional road and bridge work is required as much of the work completed was only temporary in nature to allow access to towns. Motion at 2-3; attachment 1.

2. FairPoint's telecommunications infrastructure was seriously damaged in the storm. As reported in its recent 10-Q for the third quarter 2011, FairPoint incurred \$3.2 million in storm recovery costs across Vermont, New Hampshire and Maine. Vermont received the brunt of the storm's impact. Restoration efforts throughout Vermont continued beyond September 30, 2011, and are still ongoing. The final total for complete storm recovery will be a significant cost to FairPoint. Motion at 2-3; attachment 2.

3. A large portion of FairPoint's recovery efforts were temporary as that was what was required as a result of the temporary solutions to state infrastructure repair in some areas and in order to meet immediate service restoration needs and the requests of state and municipal emergency responders, town centers, and state services throughout Vermont. Motion at 3.

4. FairPoint committed substantial resources to perform the necessary work to restore communications service to customers following the storm, but for the reasons stated above, much of the work was temporary. Once permanent infrastructure is built or repaired (roads, bridges or buildings) and FairPoint and other utilities have assessed needs and finalized designs for the location of permanent utility infrastructure (poles, etc.), then FairPoint will be able to complete the restoration projects. Motion at 3.

5. During September and October of 2011, thirty technicians were assigned to the areas most devastated by the storm damage. These areas were concentrated in the south and south-central area of Vermont. Of these thirty technicians, ten were assigned from other FairPoint service areas less affected by the storm. The additional burden on FairPoint's resources during September, October, and continuing to the present, has impacted the company's ability to complete all of the planned work on the PEP program during the third quarter of 2011, which

ended September 30, 2011, and the fourth quarter of 2011, which will end December 31, 2011. Motion at 3-4.

6. FairPoint has been working on remediation projects funded pursuant to the PEP since the time of the transfer from Verizon; however, the repair and rebuilding of critical utility infrastructure following Tropical Storm Irene has taken precedence over other planned work. If not for the storm, FairPoint believes that it was on target to spend all of the PEP funds remaining prior to December 31, 2011. In fact, through the third quarter of 2011, FairPoint averaged approximately \$2.6 million in quarterly PEP remediation spending and expected that during the fourth quarter of 2011 (the final quarter of the PEP), it would expend the remaining \$2.8 million. Motion at 4.

7. FairPoint expects that the company will have to continue to focus on infrastructure restoration efforts until all state and town road projects related to the storm are complete. Given the foregoing, it will be impossible that the approximately \$2.8 million remaining in the PEP Fund can be utilized by FairPoint by the end of 2011. Motion at 4.

8. The PEP, as approved by the Board's Order in Docket No. 7270, requires FairPoint to forfeit up to \$1 million to the VTA by December 31, 2011, if money remains in the PEP Fund. Specifically, paragraph E of the PEP states:

Forfeiture of PEP Fund Dollars. After any calendar year in which PEP Fund dollars spent for remediation is less than the total of PEP Fund set-asides due to (i) failures to meet the baseline standards of Annual Service Quality Performance Areas in the prior calendar year and (ii) Service Quality Events in the present calendar year, FairPoint shall each year forfeit the lower of \$500,000 or the balance remaining in the PEP Fund to the VTA. FairPoint shall make these payments after the close of the calendar year on or before March 15, 2009, March 15, 2010, and March 15, 2011. *By December 31, 2011, FairPoint shall make an additional forfeiture to the VTA from the PEP Fund in the amount of \$1.0 million or the amount of money remaining (if any) in the PEP Fund, whichever is less* (emphasis added). If, after making the payment due by December 31, 2011, money remains in the PEP Fund, FairPoint may reclaim the remaining funds if at any time after January 1, 2011, if it has not violated any Vermont service quality standard or requirement applicable to it at the time for a period of not less than 12 months. Until such time as FairPoint is able to reclaim the money or the PEP Fund is exhausted, FairPoint shall propose to the Board additional remediation actions to fund out of the PEP Fund which will improve service quality for consumers.

Motion at 2, 5.

9. Based on the foregoing, FairPoint requests an extension of the deadline by the Board until March 31, 2012, to spend the remaining PEP funds so as to avoid any associated financial penalties and forfeiture. This extension will allow FairPoint to reassess its PEP program, Tropical Storm Irene damage requirements and other work obligations and to schedule its work in a manner that allows it to complete its PEP obligations by March 31, 2012. Motion at 5.

10. FairPoint represents that it has discussed the relief requested in its Motion with representatives of the Vermont Department of Public Service (the "Department"). The Department has indicated it supports FairPoint's request for relief. FairPoint is willing to provide any additional materials or information the Board may require, and FairPoint is willing to offer further explanation at a workshop if the Board deems further information necessary to evaluate the Motion. Motion at 6.

IV. DISCUSSION

FairPoint asks that the Board extend the deadline of the PEP for an additional three months. The extension would change the expiration date to March 31, 2012, and, according to FairPoint, would accommodate its need to schedule completion of storm damage repairs and complete its remediation obligations under the PEP. FairPoint represents that the Department recommends Board approval of the extension request.

Pursuant to Vermont Rule of Civil Procedure 60, made applicable to the Board through Board Rules 2.103 and 2.221, the Board may relieve a party from a final order for any reason justifying relief from the operation of the judgment. Given the catastrophic damage caused by Tropical Storm Irene and the associated flooding, FairPoint believes that the Board has the authority to approve FairPoint's request for relief from enforcement of the terms of the PEP, as approved by the Board in Docket No. 7270. FairPoint further submits that the relief requested herein is justified due to circumstances beyond FairPoint's control.

We find that FairPoint's request for an extension of the PEP deadline is reasonable and approve it. One of the desired outcomes from the merger between Verizon and FairPoint, as outlined in our Order of February 2008, was to create sufficient financial incentives for FairPoint to improve service quality and meet its broadband expansion commitments. By extending the

deadline of the PEP, FairPoint should be provided with sufficient time to finalize its storm restoration plans and fulfill its investment obligations under the PEP, thus achieving the desired investment in infrastructure. That said, nothing in this Order should be construed by FairPoint as an indication of the Board's willingness to grant additional extensions of the PEP beyond the new March 31, 2012, deadline.

So ORDERED.

Dated at Montpelier, Vermont, this 29th day of December, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: December 29, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.